~~88-1953~~

~~No. 88-1952~~

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, and All Other Persons Similarly Situated,
Petitioners,

vs.

GENERAL ELECTRIC CAPITAL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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1988

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QUESTION PRESENTED

Whether a retail installment contract that expressly conditions the creditor's right to repossess, accelerate or foreclose upon giving the debtor a notice of default and right to cure "if required by applicable law" affirmatively misrepresents the debtor's right to notice of default and right to cure under 12 C.F.R. § 590.4(h)?

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JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, and All Other Persons Similarly Situated,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Petitioners filed an alleged class action on May 4, 1987 in the United States District Court for the Southern District of Georgia, Augusta Division, claiming that General Electric Capital Corporation ("GECC")[1] had assessed finance charges on Petitioners' mobile home financing contract (the "Contract") in excess of the maximum rate allowed by the Georgia Motor Vehicle Sales Finance Act.[2]

1. In compliance with Rule 28.1, GECC has listed its parent companies, non-wholly owned subsidiaries and affiliates in the Appendix hereto.

2. O.C.G.A. §§ 10-1-30 to -38 (1982) (the "Georgia Act").

(R1-1-5). The Complaint alleged that the finance charge restriction in the Georgia Act was not preempted by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 note ("DIDMCA"), and the regulations promulgated thereunder by the Federal Home Loan Bank Board (the "Regulations")[3] because of the form of language in the Contract relating to the right to notice of default and right to cure. (R1-1-6). Another count in the Complaint sought recovery on behalf of a national class alleging that GECC similarly exceeded the maximum rates in other states. The Complaint also alleged that GECC was liable under the Racketeering Influenced Corrupt Organizations Act[4] for charging the allegedly excessive finance charges. (R1-1-8, 9). The Complaint sought forfeiture of all finance charges on behalf of Petitioners and the classes that they sought to represent and damages equal to twice the finance charge for the allegedly willful violation of the Georgia Act. (R1-1-11, 12, 13). All three counts rest on the contention that the Contract is not entitled to federal preemption under DIDMCA.

GECC moved for dismissal on the ground that the Contract form at issue is entitled to federal preemption under DIDMCA, the Regulations, and settled Eleventh Circuit case authority. The Contract fully protects the buyer's right under the Regulations to receive notice of default and right to cure, since it clearly informs the debtor that *before* GECC may exercise its right to repossess or accelerate, GECC must give the debtor a notice of right to cure the default if required by applicable law. The pertinent sentence in the Contract reads:

---

3. 12 C.F.R. § 590.4 (1984).

4. 18 U.S.C. §§ 1961 *et seq.*

> Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to include repossession and or acceleration of Buyer's indebtedness hereunder, *provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right.* (Emphasis added).

The Contract also contains a state choice-of-law provision that provides as follows:

> GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

This state choice-of-law provision, which designates Georgia law as the governing state law for construction and interpretation, does not negate the application of the federal preemption statute to the Contract or affect Petitioners' right to receive notice of default and right to cure when required by the Regulations.

The district court granted GECC's motion to dismiss. On appeal, the Eleventh Circuit affirmed. 866 F.2d 396 (11th Cir. 1989). The court of appeals ruled that "the notice provision plainly meets section 590.4(h)'s requirements." *Id.* at 399. The court held that "since no contradiction exists between the [Regulations] and the application of Georgia law under the choice-of-law clause, DIDMCA applies and the interest rate is not usurious." *Id.* The Eleventh Circuit based its decision on the controlling authority of *Grant v. General Electric Credit Corporation*, 764 F.2d 1404 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1124 (1986); *Moyer v. Citicorp*

Homeowners, Inc., 799 F.2d 1445 (11th Cir. 1986); and *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), *reinstated on rehearing en banc*, 764 F.2d 1400 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986). The Eleventh Circuit denied Petitioners' petition for rehearing. The Petition to this Court followed.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION IS A CORRECT APPLICATION OF SETTLED PRECEDENT AND DOES NOT CREATE A SUBSTANTIAL ISSUE FOR REVIEW

A line of Eleventh Circuit authority has clearly established the requirements for preemption of state usury laws under DIDMCA and the Regulations. The opinion below is simply another application of that precedent to a specific contract form. The Eleventh Circuit correctly held that the Contract qualifies for preemption of state usury laws under § 501(c) of DIDMCA and § 590.4 of the Regulations.

The Petition fails to present an issue that merits this Court's review. There is no split in the circuits, and the precedent has clearly and correctly construed DIDMCA and the Regulations. The Petitioners' disagreement with the court of appeals' application of established precedent to the specific language of the Contract is misguided and is not a substantial issue that justifies review on a writ of certiorari.

A. The Contract at Issue Is Entitled to Federal Preemption of State Usury Laws Under DIDMCA and Established Precedent Construing DIDMCA

The opinion below is the fourth in a line of opinions that address the limited issue presented here of whether contractual provisions regarding the debtor's right to notice of default and right to cure disqualify a contract from federal preemption. This precedent establishes that a contract that satisfies the other prerequisites for preemption loses preemption only if the contract "expressly foreclosed" the giving of the notice of default and right to cure. *Atkinson v. General Electric Capital Corp.*, 866 F.2d 396, 398 (11th Cir. 1989). The Contract does not foreclose the giving of notice; rather it expressly preserves that right and is entitled to preemption. This issue is not appropriate for review on certiorari.

In *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), *reinstated on rehearing en banc*, 764 F.2d 1400 (1985), *cert. denied*, 476 U.S. 1124 (1986) and *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1124 (1986), the Eleventh Circuit established the basic principles for applying DIDMCA and the Regulations to specific contracts. In *Quiller*, the court recognized that DIDMCA and the Regulations require certain contractual disclosures as a prerequisite to preemption, such as the disclosure regarding the right to prepay without penalty. 12 CFR § 590.4(d). The Regulations also established debtor rights that were not disclosure rights, but rather regulate the *conduct* of the creditor. Section 590.4(h), which requires that the creditor give the debtor a notice of default and right to cure before taking action to accel-

erate, foreclose or repossess, regulates creditor conduct, not the form of the contract. Thus, *Quiller* held that § 590.4(h) did not require specific disclosure of the notice of right to cure in the contract. *Quiller,* 727 F.2d at 1070.

The *Quiller* court also held that a contract could lose entitlement to preemption if it "contains express provisions authorizing conduct *contrary* to the . . . regulations." *Id.* at 1071 (emphasis in original). In *Grant v. GECC,* decided by the en banc court of appeals on the same day as *Quiller,* the court further explained that a contract would lose preemption only if it contains "affirmative misrepresentations of the debtor's federal statutory guarantees." 764 F.2d at 1409. In *Moyer v. Citicorp Homeowners, Inc.,* 799 F.2d 1445 (11th Cir. 1986), the court of appeals reaffirmed this approach in rejecting a challenge to the specific language of a financing contract.

There is no dispute that the Contract meets all the disclosure requirements of the Regulations. Applying the above precedent, the court of appeals below concluded that the Contract "plainly meets section 590.4(h)'s requirements." *Atkinson,* 866 F.2d at 399. A comparison of the Contract with the contract language in *Grant* and *Moyer* compels the conclusion that the Contract complies with the requirements of § 590.4(h) and is entitled to preemption. The relevant sentence of the Contract reads:

> Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to include repossession and or acceleration of Buyer's indebtedness hereunder, *provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right.* (Emphasis added).

The en banc Court in *Grant* ruled that the following contract language, almost identical to that in the instant case, did not contradict the Regulations and was entitled to preemption. The contract in *Grant* read:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable [the debt] provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

As here, the right to accelerate in *Grant* was conditioned on the giving of notice. The language expressing the condition precedent in the *Grant* contract is the same as the language in the Contract at issue except for the addition of "if required by applicable law."

Petitioners erroneously contend that the phrase "if required by applicable law" disqualifies the Contract from preemption. To the contrary, "if required by applicable law" is an appropriate limitation on the right to notice since notice may or may not be required under the Regulations. As the court of appeals held and as § 590.4(h) states, there are three separate circumstances in which a creditor may in fact accelerate, repossess or foreclose without giving the section 590.4(h) notice: (1) abandonment; (2) other extreme circumstances; (3) instances in which two notices have been sent during any one-year period. 866 F.2d at 399 and n.3. The contract provision for notice "if required by applicable law" mandates that notice be given unless one of these three circumstances exists. It does not foreclose the giving of notice when required; rather it accurately states the buyer's right to notice.

The court of appeals found that the language of the Contract "appears to be indistinguishable" from the con-

tract found to qualify for preemption in *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986). In *Moyer* the contract provided:

> *Subject to Buyer's Right to Notice of Default and Right to Cure such default, if any,* whenever a default shall occur, or at any time thereafter, (such default not having previously been cured) Seller may declare [the debt] due and payable and Seller shall have all the remedies of a secured party under the Uniform Commercial Code. (Emphasis added).

799 F.2d at 1450. The right to notice "if any" carries the same import as the language at issue here - "if required by applicable law." The *Moyer* court upheld the "if any" language since it "expressly conditions the seller's rights of acceleration and forfeiture [sic] on the *satisfaction of the buyers' right of notice and right to cure.*" 799 F.2d at 1450. (Emphasis added). In the present case, the proviso requiring that the "Buyer shall be given a notice of right to cure the default if required by applicable law" is just another way of saying the same thing—the creditor will not act without giving the notice that is required by law.

In contrast, the Contract does not state or suggest that the creditor can repossess or accelerate "without notice," as did the *Quiller* contract. In *Quiller*, the contract permitted a creditor

> (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice."

727 F.2d at 1072. No similar affirmative misrepresentations of the notice right are present here. Rather, as

in *Grant* and *Moyer*, the Contract specifically provides for giving of the notice as required by § 590.4(h) as a condition precedent to the right to accelerate.

Petitioners argue that the opinion below improperly creates a presumption of preemption. Petitioners ignore that Congress did not make the availability of preemption contingent on any specific election or declaration by the creditor or the consumer. As a prerequisite to preemption, Congress did require certain contractual provisions, and there is no dispute that the Contract contains all of these provisions. As noted above, however, § 590.4(h) regulates conduct, not disclosure, and a contract otherwise entitled to preemption can lose preemption only if the creditor actually fails to give the required notice or if the contract forecloses the giving of that notice. Here, there is no claim that GECC failed to give Petitioners the required notice when they defaulted, and the Contract provides for the giving of the required notice. The Contract is entitled to preemption. § 590.4(b)(1).

Petitioners argue that the issues here merit the issuance of a writ because the Solicitor General supported certiorari in *Quiller*. Petitioners, whose counsel represented the debtors in *Quiller* and *Grant*, fail to mention that the Solicitor General did not support the position advanced by the debtors in either case, but supported the petition of the *creditor* in *Quiller* whose contract was held not to comply with the Regulations. *See* Brief of the United States in 85-541 at 16. Moreover, all of the decisions since *Quiller* have been consistent with the position of the Solicitor General in *Quiller*, not with Petitioners' arguments.

B. The Designation of Georgia Law As the Governing State Law Does Not Preclude the Application of Federal Law

Petitioners also contend that because the Contract designates Georgia law as the governing state law for its construction and interpretation, the Contract therefore necessarily *excludes* the application of federal law for any purpose, including preemption. This contention is both illogical and contrary to established law. This issue does not merit review on certiorari.

The state choice-of-law provision at issue is a typical conflicts of law provision and reads:

> GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

The above provision does not exclude or negate the application of federal law, but merely designates the particular state law that will govern the construction and interpretation of the Contract. This Court has held that language substantially identical to the above provision in no way affects the applicability of federal law to the contract. In *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982), the Court said:

> We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). See also *Testa v. Katt*, 330 U.S. 386, 390-392 (1947).

In the *Fidelity Federal* case, a mortgage instrument contained a choice-of-law provision stating that it would be governed by "the law of the jurisdiction" in which the property was located. It was argued that the parties had thereby agreed to be bound by state law governing due-on-sale clauses rather than federal law. As here, the argument was that the contractual choice-of-law provision negated the application of preemptive federal regulations issued by the Federal Home Loan Bank Board. The Court rejected this argument, stating that:

> Paragraph 15 [of the mortgage] provides that the deed is to be governed by the "law of the jurisdiction" in which the property is located; *but the "law of the jurisdiction" includes federal as well as state law.*

458 U.S. at 157, n.12 (emphasis added). The Court noted that the purpose of the choice-of-law provision was "not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage." *Id.*

Applying *Fidelity Federal*, the court of appeals concluded that the Georgia choice-of-law provision in the Contract in no way signifies that the Regulations' notice requirements are inapplicable. Rather, "applicable law" includes federal law, since the federal laws "are as much a part of the law of [Georgia] as its own local laws and Constitution." 458 U.S. at 157.

In drafting contracts of this nature, it is important to include a provision specifying the governing state law because, as is recognized in § 590.4(b)(2)(i)(A) of the Regulations, state laws regulate many aspects of the contract not covered in the preemption Regulations. The

choice-of-law provision removes any question of choice of law among the potentially applicable state laws. For example, the Georgia Act places certain requirements on contracts that are different from those in other states, including disclosure of insurance coverage for bodily injury and property damage, a specified "Notice to Buyer" clause, acknowledgment of receipt of the contract by the buyer, type size requirements, and certain requirements relating to insurance covering the manufactured home. Rules of contract interpretation and construction also vary from state to state. A choice of state law provision allows these requirements to mesh with applicable federal law in regulating the contract.

Petitioners erroneously argue that *Volt v. Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S. Ct. 1248 (1989), discards *Fidelity Federal* and allows a choice-of-law provision to negate the application of federal law. In fact, the opinion of the majority in *Volt* does not undercut or even cite *Fidelity Federal*. *Volt* holds only that a state choice-of-law provision can operate to allow a state law to apply where it is not inconsistent with federal law. 109 S. Ct. at 1254-55. As noted above, this meshing of federal and state law is expressly contemplated by the Regulations under DIDMCA and is fully consistent with the court of appeals' decision here. This meshing of federal and state law is precisely what the language of the Contract accomplishes. Contrary to Petitioners' argument, *Volt* does not allow a contractual choice-of-law provision to negate the application of federal law. Even more fundamentally, as the Court recognized in *Volt*, the question of the proper interpretation of a clause in a contract ordinarily does not merit review by this Court. 109 S. Ct. at 1253.

CONCLUSION

The Petition does not satisfy the requirements for the issuance of a writ of certiorari. It does not raise an important issue of federal law, seek to resolve a conflict in the lower courts, or otherwise raise an issue appropriate for this Court's review on a writ of certiorari. The Petition should be denied.

Respectfully submitted,

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APPENDIX

In compliance with Rule 28.1, the following are the parent companies, non-wholly owned subsidiaries and affiliates of General Electric Capital Corporation:

General Electric Company

General Electric Financial Services, Inc.

BMW Leasing Corporation

BMW Credit Corporation

FGIC Corporation

Financial Guarantee Insurance Corporation

General Electric Capital Auto Resale Services, Inc.

General Electric Capital Auto Auctions, Inc.

Genstar Container Corporation

Montgomery Ward & Co., Incorporated

Montgomery Ward Holding Corporation

Polaris Holding Company

Polaris Aircraft Leasing Corporation